IN THE

Supreme Court of the United States

October Term, 1975

No. 75-770

TREADWAY COMPANIES, INC., et al.,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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MISCELLANEOUS.

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QUESTION PRESENTED.

While the decision of the Court of Appeals for the Third Circuit presents important questions appropriate for review by this Court (see the petition for a writ of certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.,** October Term 1975, No. —), only one question can properly be raised by the petitioners herein, to wit:

Did the Court of Appeals for the Third Circuit err in ordering a new trial on the grounds that petitioners' claims that respondent had violated Section 7 of the Clayton Act and that petitioners had been injured as a result thereof, were submitted to the jury under erroneous instructions?

STATEMENT.

By their petition for a writ of certiorari, the plaintiffs in a private antitrust action seek review by this Court of the decision of the United States Court of Appeals for the Third Circuit reversing a treble-damage verdict and divestiture order in their favor and remanding the case to the district court for a new trial. Respondent agrees with petitioners that the decision below should be reviewed by this Court, but not on the questions which petitioners set forth in their petition and not for the reasons stated by petitioners.

Respondent submits that this Court should review the portion of the Third Circuit decision which holds that respondent was not entitled to judgment as a matter of law, to wit, the Third Circuit's determination (1) that the mere continued presence of certain local bowling centers allegedly "acquired" [1] by respondent in violation of Section 7 of the Clayton Act, 15 U. S. C. § 18, could afford a basis for petitioners to recover money damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, even though there was no proof that the "acquisitions" resulted in any lessening of competition or monopoly, (2) that petitioners could maintain their damage action even though their entire damage case was based on the premise that, had it not been for respondent's "acquisitions", the "acquired" bowling centers would have gone out of business, and (3) that petitioners should be given a second chance to demonstrate that the "acquired" companies were "engaged in commerce" within the meaning of Section 7 of the Clayton Act. In **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.** (October Term 1975, No. —), respondent sets forth what it believes to be the reasons why this Court should grant a

1. See footnote 5 *infra*.

writ of certiorari and respondent respectfully directs the Court's attention to that petition.

Insofar as consideration of the instant petition is concerned, respondent believes it important that the Court should be provided with a more complete exposition of the history of the case than appears in the cryptic summary set forth in the petition.

This lawsuit came about as a direct result of the erratic fortunes of the recreational bowling industry. With the introduction of automated equipment in the mid 1950's, the industry flourished and new bowling establishments sprang up all over the country. During this growth period, respondent (at that time one of the two major American manufacturers of bowling equipment) sold large quantities of automatic pinsetters and bowling lanes to operators of local bowling centers.[2] This equipment required a substantial capital investment and respondent financed the sale of this equipment on extended secured credit terms (866a-868a, 1563a-1573a).

In the early 1960's, the industry went into a sharp decline and respondent experienced a nightmare of collection problems. Defaults on equipment payments by bowling center operators became commonplace and numerous operators were in such hopeless financial straits that it became clear there was no reasonable prospect of payment. Exercising its chattel security rights, respondent made numerous repossessions and attempted to dispose of the repossessed equipment at discount prices. Even at these discount prices, sales of the repossessed equipment could not keep pace with the repossessions. This placed respondent in a very precarious financial position. Over the

2. Since 1963, there have been very few sales of new bowling equipment due to the availability of large quantities of used equipment (1574a-1575a, 2666a).

Record references herein are to the appendix in the court of appeals.

years, respondent had borrowed large sums of money to finance the manufacture and sale of bowling equipment. The wherewithal to repay this indebtedness was to come from payments by bowling center operators on the equipment which respondent had sold to them on credit. By the end of 1964, respondent owed close to $300 million on its borrowings. At the same time, its receivables were in excess of $400 million, of which more than $100 million was over ninety days delinquent. Respondent's warehouses were filled with repossessed equipment. In an effort to reverse its deteriorating financial condition, respondent decided that, in those cases in which attempts to collect receivables from bowling center operators failed, respondent would repossess its bowling equipment and attempt to sell the equipment in place to third parties. If no sale could be effected, respondent would consider operating the failing center itself if there appeared to be a reasonable prospect that a positive cash flow would result (1573a-1592a, 2112a-2124a, 2142a-2144a, 2156a-2161a, 2684a).

In January 1965, respondent formed a Bowling Center Operations Division which was charged with the duty of evaluating bowling centers whose equipment respondent would repossess and operating those centers which respondent would take over. Between 1965 and 1972, respondent evaluated over 600 hopelessly delinquent centers and took over the operation of 222 of them. Respondent disposed of 11 of these 222 centers to third parties and closed 43 of them which were unable to develop a positive cash flow. The highest number of bowling centers operated by respondent at any one time under this program was 169 (1610a, 1616a-1623a, 1677a-1680a, 2681a).[3]

The bulk of respondent's bowling center operations began in 1965, the year that respondent created its Bowling

3. In 1972, there were a total of 8,818 bowling centers in the United States of which respondent operated 168 (1672a-1673a), less than 2% of the total.

Center Operations Division. In that year, respondent commenced operating 124 bowling centers (1617a, 2681a). Three of the areas in which respondent began operating bowling centers in 1965 were Poughkeepsie, New York; Pueblo, Colorado; and Paramus, New Jersey. Petitioners operated bowling centers competitive to the ones "acquired" by respondent in those three areas (203a, 264a, 296a-297a, 329a-333a, 389a-392a, 692a, 1646a, 1988a).[4]

Claiming that respondent's taking over and continuing the operation of bowling centers violated Section 2 of the Sherman Act ("monopolization" and "attempt to monopolize") and Section 7 of the Clayton Act ("acquisitions" whose effect "may be substantially to lessen competition, or to tend to create a monopoly"), petitioners brought suit against respondent seeking money damages (under Section 4 of the Clayton Act) and equitable relief (under Section 16 of the Clayton Act). There ensued a lengthy jury trial in the United States District Court for the District of New Jersey.

There was no evidence at the trial that competition among bowling centers in the Poughkeepsie, Pueblo and Paramus areas was lessened in any degree (let alone "substantially") by reason of respondent's taking over or operating any bowling center, nor was there any showing that any of the centers achieved a greater share of the local bowling patronage after respondent began operating it

4. The bowling centers operated by petitioners were Holiday Bowl-O-Mat (near Poughkeepsie, New York), Pueblo Bowl-O-Mat (in Pueblo, Colorado) and Paramus Bowl-O-Mat (in Paramus, New Jersey). Each of the operators of these bowling centers is a subsidiary of Treadway Companies, Inc. which, through its subsidiaries, operates bowling centers throughout the United States (109a-112a).

than the center had under its prior operator. Throughout the trial, petitioners took the position that respondent had violated the law in taking over the centers and keeping them in business, that each of the petitioners (as a competitor of one of the centers) was "injured" by the mere continued presence in the market of the center operated by respondent and that, therefore, petitioners were entitled to recover as "damages" the difference between what their bowling centers actually earned and what those centers would have earned had the "acquired" [5] centers failed and disappeared from the market (551a-552a, 566a, 580a-583a, 595a-610a, 673a, 785a, 889a-890a, 899a-900a).

The trial judge denied respondent's motions for directed verdicts (5a) and submitted the case to the jury on

5. It is not at all clear that respondent had "acquired" any of these centers within the meaning of Section 7 of the Clayton Act. Respondent entered two of the three markets involved in this case (Poughkeepsie and Pueblo) not by purchasing the stock or assets of an existing business enterprise but by exercising its rights as a secured creditor—repossessing, after continuous defaults, assets in which it had an existing security interest. There is nothing in the legislative history of Section 7 of the Clayton Act which suggests that the section was intended to cover a secured creditor's exercise of its right to recover equipment upon default in equipment payments by the debtor.

Respondent entered the third market (Paramus) by purchasing at a bankruptcy sale the capital stock of two bowling centers which also had defaulted in equipment payments. The legislative history of the 1950 amendments to Section 7 of the Clayton Act demonstrates that Section 7 does not apply to purchases made at bankruptcy sales. See H. R. Rep. No. 1191, 81st Cong., 1st Sess. at p. 6 (1949):

> "The argument that a corporation in bankruptcy or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases."

See also S. Rep. No. 1775, 81st Cong., 2d Sess. at p. 7 (1950) to the same effect.

petitioners' liability and damage theories. After instructing the jury generally with regard to charges of violation of Section 2 of the Sherman Act, 15 U. S. C. § 2 (2257a-2266a), and Section 7 of the Clayton Act, 15 U. S. C. § 18 (2267a-2273a), the trial judge gave the jury specific directions as to how it should apply Section 7 to the case before it. He charged (2317a-2318a):

> "The Section 7 charge applies only to the local markets of Pueblo, Poughkeepsie and Paramus. I ask you, therefore, to direct your attention to those markets.
>
> "The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area.
>
> "If Brunswick's acquisition of Belmont Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Belmont Lanes. You may consider that Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers. Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly

may conclude that Brunswick by the acquisition of Belmont Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market."

Virtually identical instructions were given respecting the Poughkeepsie and Paramus markets (2319a-2321a).

On the question of damages, the trial judge first gave a general instruction (2322a-2326a), and then said (2326a-2327a):

"Plaintiffs' witnesses [naming them] all were qualified as expert witnesses. They were entitled to give their opinion as to profits which the plaintiff bowling centers would have made but for defendant's violations of law. These witnesses estimated the amount of business which would have come to plaintiffs' bowling centers if Brunswick had not operated a competitive center or had permitted it to close down in the normal course. Their opinion varied to some extent and the range of damages reflected by the opinions is reflected on Plaintiffs' Exhibit 53 in evidence.

"Although there was some differences in amount, these witnesses mutually corroborated each other both in the methods used in determining damages and in general estimates as to the extent of damages. I instruct you that if you believe any of [plaintiffs' witnesses] was telling the truth, then you must believe that all were telling the truth since they mutually corroborated each other and since there was no contradictory evidence offered by Brunswick as to extent

of damages, except that the defendant denies that the plaintiffs are entitled to any damages.

"With regard to plaintiffs' Request #120, I will charge: You may disregard this testimony as to damages only if you find all these witnesses [naming them] were discredited or impeached by contradictory evidence. I instruct you that if you find that the antitrust laws have been violated and that plaintiffs' corporations have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits. . . ."

After setting forth the range of damages estimated by petitioners' witnesses in connection with the claims of monopolization and attempt to monopolize (2328a-2331a), the trial judge charged the jury (2331a-2332a):

"If you do not find that Brunswick either monopolized the national market or monopolized any of the local markets or attempted to monopolize any of the local markets, you may still assess damages if you find that Brunswick violated Section 7 of the Clayton Act.

"Brunswick violated Section 7 of that Act if you find that its acquisition of any of [the specific bowling centers] had the effect of substantially lessening competition or of tending to create a monopoly.

"Or if you find that Brunswick did monopolize or attempt to monopolize some of the local markets but not all, then if any of the local markets I have just named were not among them, you must still consider them under Section 7. You must assess damages

if you find that Brunswick acquired one of those last named local markets with the effect of substantially lessening competition or tending to create a monopoly.

"If you find that Brunswick acquired one of these local bowling centers with such an effect, then you must assess damages with respect to that local market in the same way I have previously described in connection with monopolization and attempted monopolization."

The trial judge instructed the jury to return separate verdicts as to each plaintiff and as to each claim (2352a-2354a).

The verdicts returned by the jury (2384a-2385a) found **for** * respondent on the claims of monopolization and attempted monopolization under Section 2 of the Sherman Act, but **against** respondent on the claims under Section 7 of the Clayton Act. The jury awarded as damages the exact amounts of the lowest estimates by petitioners' witnesses of the additional revenues and profits that petitioners' bowling centers would have earned over the years if the "acquired" centers had failed and gone out of existence on the day respondent commenced operating them (2549a).

Subsequent to the jury verdict and the denial of respondent's post-trial motions (Pet. App. 33a-49a), the trial judge issued an opinion on the question of equitable relief (Pet. App. 50a-60a). Relying upon the jury determination that respondent had violated Section 7 of the Clayton Act, the trial judge directed respondent to divest itself of the bowling centers in Poughkeepsie, Pueblo and Paramus.

The Court of Appeals for the Third Circuit reversed and remanded for a new trial (Pet. App. 1a-23a). The

* Wherever boldface is used in this brief, the emphasis is ours.

Court of Appeals held that petitioners had adduced sufficient evidence to get their Section 7 case to the jury, notwithstanding the fact (established by the jury's Section 2 verdict) that respondent had neither monopolized nor attempted to monopolize the business of operating bowling centers (either nationally or in the three local markets) and notwithstanding the absence of any showing that respondent's activities in these three markets had resulted in any lessening of competition. According to the Court of Appeals, "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, **whether or not that injury flows from or results in an actual lessening of competition**" (Pet. App. 19a).

Although it held for petitioners (erroneously, respondent submits) on this basic legal proposition, the Court of Appeals concluded that the case had to go back for a new trial on both liability and damages because neither aspect of the case had been properly submitted to the jury. On the question of whether there had been a violation of Section 7 of the Clayton Act, the Court of Appeals held that the trial judge's charge "was virtually a directed verdict" against respondent (Pet. App. 21a). "Without highlighting other factors, [the charge] emphasized the market share held by Brunswick in each of the markets in question, after the acquisitions" (Pet. App. 21a). "The charge was defective in a number of ways. It did not say, for example, that the jury must consider such factors as the relative financial strength of Brunswick, Treadway, and other competitors. . . . Nor did the charge say that the jury must find that Brunswick's position as an equipment manufacturer or equipment financier gave it any retail market advantage. . . . The jury also was not asked to

take into account the historical tendency in the industry toward concentration or lack of such a tendency" (Pet. App. 21a-22a). "By emphasizing the quantitative substantiality of the market shares held by Brunswick, to the exclusion of other factors, the court failed to draw the jury's attention to the indicators of qualitative substantiality referred to in *Brown Shoe Co. v. United States, supra, Reynolds Metals Co. v. FTC, supra,* and *FTC v. Procter & Gamble Co., supra*" (Pet. App. 22a) the three cases which the Court of Appeals had earlier cited as the basis for its holding that petitioners had adduced sufficient evidence to get the jury on the question whether respondent's "acquisitions" violated Section 7 (Pet. App. 11a-14a).[6] "While the quantitative substantiality of the market shares is important in a case involving a merger of horizontal competitors, it is far less important here because Brunswick was not previously in any of the three markets. Brunswick's entry into the picture did not increase concentration, but only acted as a substitution of competitors" (Pet. App. 22a).

The Court of Appeals also found error in the trial judge's instruction on damages. In the first place, said the Court of Appeals, "the thrust of this instruction, indeed the thrust of plaintiffs' § 4 theory, was that damages were to be computed by first assuming that each Brunswick-acquired center would have closed down at the moment of the takeover, but for the takeover and then by projecting what portion of the closed center's business would have been captured by Treadway's centers. However, since plaintiffs' § 7 theory was based on the presence of the violator, Brunswick, in the market, the jury should have been determining what plaintiffs' profits would have been if the violations had *never* occurred. In other words, the jury should have first been instructed to find whether the acquired centers would, in fact, have gone out of business, rather than being taken over by someone else or continuing in business by extensions of credit. Such a finding was a prerequisite to establishing any proximate causal relationship between the § 7 violation and the only evidence of injury to business or property which was presented" (Pet. App. 25a-26a). But the jury was never instructed that it had to make such a finding before it could award damages. "The effect of the damage charge was to relieve [petitioners] of [the] burden [of proving an injury to their property or business proximately related to the alleged Section 7 violation] and permit the jury to award damages on a theory which assumed an essential fact on which no finding was made" (Pet. App. 26a). Moreover, the instruction to the jury that, if it found a violation of the antitrust laws, it had to "find damages in the amounts falling within the range as indicated by the testimony and exhibits" (2327a) "was error, for it is clear that a trier of fact is at liberty within the bounds of reason to reject in whole or in part the uncontradicted testimony of a witness which does not convince the trier of its merit. This rule applies on the issue of damages as on any factual issue" (Pet. App. 27a).

Finally, the Court of Appeals reversed the trial court's order granting equitable relief, saying that "it is clear that an essential predicate for the [equitable relief] decision was that the jury verdict established Brunswick's unlawful presence in the market" and "with clear indications of the court's reliance on the jury's verdict, a verdict which we have concluded is tainted by erroneous legal instructions, we think that § 16 relief must also be reconsidered after a new trial" (Pet. App. 28a). The Court of Appeals then

6. **Brown Shoe Co. v. United States,** 370 U. S. 294 (1962); **Reynolds Metals Co. v. FTC,** 309 F. 2d 223 (D. C. Cir. 1962); **FTC v. Procter & Gamble,** 386 U. S. 568 (1967).

went on to say that, since the trial court might eventually again be asked to issue a divestiture order in this case, it would set forth its views on the appropriateness of that remedy. Reviewing the case law and the legislative history analyzed by the Court of Appeals for the Ninth Circuit in **International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.**, 518 F. 2d 913 (9th Cir. 1975), the Third Circuit questioned the validity of the Ninth Circuit's conclusion that divestiture is not a remedy available to a private plaintiff under Section 16 of the Clayton Act but found it unnecessary in this case to "decide a rule of general application with respect to the availability of divestiture relief under § 16. Even if such a private remedy is available, it would in our view be inappropriate because less drastic relief will provide sufficient redress" (Pet. App. 30a).[7]

7. The Court of Appeals continued (Pet. App. 30a-31a):

"It must be recalled that we are dealing with three separate geographic markets, and thus with three separate problems of relief. The focus of the remedy, then, must be on what can be accomplished to overcome the threat to competition in those specific markets. If the suit had been commenced at a time when the court might have prevented the acquisitions by Brunswick or any other deep pocket owner, and if it had done so, one of two things might have happened. Brunswick might have allowed the bowling centers to close, and would thereby have eliminated any § 4 injury to plaintiffs' property or business. Alternatively, Brunswick might have found another purchaser whose presence in the market would have retained the same level of competition. The injury to Treadway's property or business at least on this record would have been the same, but there would have been no § 7 violation on which to predicate either a § 4 or a § 16 action. At this late stage, ten years after the acquisition, divestiture of going, thriving bowling centers to other purchasers will not change the competitive picture. By now the formerly threatened businesses have survived.

"An alternative to a sale, of course, would be to dismantle the centers. But at this time such a procedure would merely reduce competition artificially in the three markets to the

7. (Cont'd.)

detriment of the public. If this had been a merger between competitors so that its effect would almost inevitably have been anticompetitive, divestiture, if authorized, might have been appropriate. But where the § 7 violation is by a new entrant purchasing an existing competitor in an existing market, relief should be restricted to preventing those practices by which a deep pocket market entrant harms competition. Otherwise what is intended as a shield for smaller competitors becomes a sword against the consumer. Given the type of § 7 violation which plaintiffs alleged and attempted to prove, divestiture was simply inappropriate."

ARGUMENT.

I.

The Court of Appeals' Action in Setting Aside the Verdict Because of Improper Jury Instructions Does Not Present Any Issue Warranting Review by This Court.

It is true, as petitioners state, that the decision of the Court of Appeals in this case has "far-reaching ramifications" (Pet. 10). But these ramifications do not stem from the decision to set aside the jury verdict in petitioners' favor. Rather, they stem from the finding by the Court of Appeals that respondent was not entitled to judgment as a matter of law. The point to which the Court of Appeals was referring when it spoke of "far-reaching ramifications" (Pet. App. 19a) was its holding that "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition" (Pet. App. 19a). It is this holding and the other holdings by the Court of Appeals **in petitioner's favor** which present the significant issues in this case and the issues upon which this Court should grant a writ of certiorari. See respondent's petition for certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.** (October Term 1975, No. —). The holding by the Court of Appeals that the jury verdict in petitioners' favor should be set aside because of improper instructions does not present any issue calling for review by this Court. That holding turns upon the precise facts of the case and the language of the instructions below, and is not of general importance.

Throughout Point I of their Argument (Pet. 10-15), petitioners totally ignore the Court of Appeals' holding that "the § 7 charge was inappropriate to the only theory upon which a § 7 violation could in the circumstances of this case be predicated" (Pet. App. 23a). Thus, for example, petitioners' state that "despite its abstract endorsement of the propositions that respondent Brunswick violated Section 7 of the Clayton Act and that such violation was legally compensable under Section 4 of that Act, the court of appeals mandated a new full-scale jury trial for the determination of already established facts" (Pet. 12). This is not so. The Court of Appeals did not hold that respondent had violated Section 7 or that petitioners had sustained legally compensable damages. What it held was that petitioners had adduced sufficient evidence to get their case to the jury under proper instructions—instructions that the Court of Appeals found were absent here. There are no "already established facts" in this case showing either a violation or compensable injury. The Court of Appeals held that the requisite factual determinations had to be made by a properly-instructed jury.

Similarly erroneous is petitioners' statement that "the court of appeals recognized that the mere presence of respondent as a competitor in its customers' markets was illegal" (Pet. 13). The Court of Appeals "recognized" no such thing. All it "recognized" was that "in some industries the acquisition of a competitor by a deep pocket parent can have sufficient potential to harm horizontal competitors so as to violate § 7" and that "there was sufficient evidence of such potential here to submit the case to the jury on the issue of effect on competitors" (Pet. App. 14a). But what the Court of Appeals also "recognized" was that this issue had not been properly submitted to the jury (Pet. App. 20a-23a).

Petitioners also ignore the fact that the jury instruction on damages was improper even if one were to accept the propositions (1) that petitioners were entitled to recover for "injuries" resulting from respondent's mere continued presence in the market and (2) that the compensable "damages" could consist of the additional income petitioners' bowling centers would have obtained had the "acquired" centers failed and gone out of existence.[8] The trial judge had instructed the jury in unequivocal terms that, if it found that respondent had violated the antitrust laws, it had to award damages falling within the range shown in the testimony and exhibits introduced by petitioners (2327a). This was plainly improper. None of the damage witnesses was disinterested. All were officers or employees of petitioners. The proof of damages which they submitted was based on numerous assumptions, any one or all of which were in the province of the jury to reject. The fallacies in the damage estimates by these witnesses were demonstrated during extensive cross-examination. Certainly, the jury had the right, as does every jury, to find the witnesses unreliable and to reject their testimony. "The credibility of the witnesses in showing damages is for the jury." **Hobart Brothers Company v. Malcolm T. Gilliland, Inc.,** 471 F. 2d 894, 903 (5th Cir.), *cert. denied* 412 U. S. 923 (1973). The jury is "not bound nor concluded by the opinion testimony of any witness, expert or otherwise." *Ibid.* The jury can reject a plaintiff's damage evidence even where the defendant presents no evidence on damages. **Cape Cod Food Products v. National Cranberry Ass'n.,** 119 F. Supp. 900, 916 (D. Mass. 1954).

8. Respondent, of course, strenuously disagrees with both of these propositions. See the petition for certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.** (October Term, 1975, No. —).

When the trial judge instructed the jury that, if it found a violation of the antitrust laws and injury to petitioners, it "must also find damages in the amounts falling within the range as indicated by the testimony and exhibits" (2327a), he clearly impinged upon the jury's right to determine all issues of fact including the credibility of witnesses and the correctness of the assumptions on which they based their testimony. Since the jury awarded damages to petitioners in the exact amount set forth as the "lower range" of damages in petitioners' damage exhibits (2549a), it is obvious that the jury was following the trial judge's instructions scrupulously and went as low as it could without violating those instructions. Even if the charge were otherwise impeccable (which it was not), the Court of Appeals had no choice but to set aside the verdict.

It is clear that the Court of Appeals' action in setting aside the verdict because of improper jury instructions does not present any issue of general importance warranting review by this Court.

II.

The Question Whether the Remedy of Divestiture Is Available to Private Antitrust Plaintiffs Is Not an Issue Upon Which Certiorari Should Be Granted in This Case.

The question to which petitioners address the Court's attention in Point II of their Argument is not an issue upon which certiorari should be granted in this case. Whether the remedy of divestiture is generally available to private plaintiffs under Section 16 of the Clayton Act,[9] is not an issue that is properly presented here in view of the manner

9. Section 16 of the Clayton Act, 15 U. S. C. § 26, gives a private plaintiff the right "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

in which the Court of Appeals dealt with the divestiture issue in this case.

In the first place, the question of equitable relief in the instant case is not ripe for review. The Court of Appeals set aside the equitable relief order not because it held that divestiture is not an available remedy in private antitrust cases but because "an essential predicate for the decision [granting equitable relief] was that the jury verdict established Brunswick's unlawful presence in the market" and "with clear indications of the court's reliance on the jury's verdict, a verdict which we have concluded is tainted by erroneous legal instructions, we think the § 16 relief must also be reconsidered after a new trial" (Pet. App. 28a). The ensuing discussion in the Court of Appeals' opinion on the question of the availability of divestiture as a remedy was solely for the purpose of providing guidance to the trial court if and when the question of equitable relief would again arise. Thus, in the context of this case, the question is premature.

Secondly, in providing guidance to the trial court in this case, the Court of Appeals stated expressly that it was not laying down "a rule of general application with respect to the availability of divestiture relief under § 16" (Pet. App. 30a). Rather, it held that, "even if such a private remedy is available" (Pet. App. 30a), "divestiture was simply inappropriate" here (Pet. App. 31a) for the reasons stated *supra*, p. 15. These reasons relate only to the facts of this case and are not of general applicability.

Furthermore, even assuming *arguendo* that the issue is properly presented in this case, the fact is that, notwithstanding petitioners' assertions, there is no "widespread conflict among the circuits on the important issue of whether or not private antitrust plaintiffs have standing to receive a divestiture order" (Pet. 16). With the exception

of the instant case (wherein the Court of Appeals for the Third Circuit specifically declined to decide the issue), there are only two court of appeals decisions which actually have dealt with the question and they both reach the conclusion that divestiture is not an available remedy for private antitrust plaintiffs. See **Continental Securities Co. v. Michigan Cent. R. Co.**, 16 F. 2d 378, 379-380 (6th Cir. 1926), *cert. denied* 274 U. S. 741 (1927), and **International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.**, 518 F. 2d 913, 920-926 (9th Cir. 1975).[10] This ruling is consistent with the legislative history, which shows that the House committee which proposed Section 16 of the Clayton Act intended that divestiture not be available as a remedy to private plaintiffs.[11] From the time of enactment of the Clayton Act through 1962, the court uniformly took the position that divestiture is not an available remedy under Section 16 since that Section speaks only of preventative relief, *i.e.*, "injunctive relief . . . against threatened loss or damage" and does not empower private parties to ask a court to undo completed transactions.[12]

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10. Petitioners cite (Pet. 16) **American Crystal Sugar Co. v. Cuban-American Sugar Co.**, 259 F. 2d 524 (2d Cir. 1958) and **Credit Bureau Reports, Inc. v. Retail Credit Co.**, 358 F. Supp. 780 (S. D. Tex. 1971), *aff'd* 476 F. 2d 989 (5th Cir. 1973), and imply that the courts of appeals for the Second and Fifth Circuits have ruled that divestiture is an available remedy (Pet. 18). Neither of these courts has so ruled. The **American Crystal Sugar** case does not discuss the question and the **Credit Bureau** ruling was a district court decision which the Court of Appeals affirmed on other grounds.

11. The legislative history is set forth in the Ninth Circuit's opinion in the **International Tel. & Tel.** case, 518 F. 2d at 921-924.

12. In addition to the Sixth Circuit decision in the **Continental Securities** case cited in text, see **Venner v. Pennsylvania Steel Co.**, 250 Fed. 292, 296 (D. N. J. 1918); **Graves v. Cambria Steel Co.**, 298 Fed. 761, 762 (S. D. N. Y. 1924) (Learned Hand, J.); **Fein v. Security Banknote Co.**, 157 F. Supp. 146, 148 (S. D. N. Y. 1957); **American Commercial Barge Line Co. v. Eastern Gas & Fuel Ass'n.**, 204 F. Supp. 451, 453 (S. D. Ohio 1962).

It is true that, beginning in 1964, a number of district courts have stated that the remedy of divestiture may be an appropriate form of relief under Section 16 of the Clayton Act. These were mainly district courts in the Ninth Circuit,[13] and their decisions have been effectively overruled by the recent **International Tel. & Tel.** decision of the Court of Appeals for the Ninth Circuit.[14] There have been only three private cases in which divestiture actually has been ordered [15] and in all three the divestiture orders have been set aside, the Third Circuit having done so in the instant case and the Ninth Circuit having done so in the other two cases.[16]

13. The district court decisions in the Ninth Circuit are **Bailey's Bakery, Ltd. v. Continental Baking Co.,** 235 F. Supp. 705, 717 (D. Hawaii 1964), *aff'd per curiam* 401 F. 2d 182 (9th Cir. 1968), *cert. denied* 393 U. S. 1086 (1969) (dictum); **Burkhead v. Phillips Petroleum Co.,** 308 F. Supp. 120, 127 (N. D. Cal. 1970); **Bay Guardian Co. v. Chronicle Publishing Co.,** 340 F. Supp. 76, 81-82 (N. D. Cal. 1972); **Calnetics Corp. v. Volkswagen of America, Inc.,** 348 F. Supp. 606, 616 (C. D. Cal. 1972) and 353 F. Supp. 1219 (C. D. Cal. 1973); **International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.,** 351 F. Supp. 1153, 1203-1210 (D. Hawaii 1972), *rev'd* 518 F. 2d 913 (9th Cir. 1975). *Compare* **McKeon Construction v. McClatchy Newspapers,** 1970 Trade Cases ¶ 73,212 at p. 88,817 (N. D. Cal. 1969), where the court declined to determine the question on a motion to dismiss.

14. The only other decisions of which we are aware which state that divestiture is an available private remedy are **Julius M. Ames Co. v. Bostitch, Inc.,** 240 F. Supp. 521, 526 (S. D. N. Y. 1965) (denying motion to dismiss a Section 7 claim); **Credit Bureau Reports, Inc. v. Retail Credit Co.,** 358 F. Supp. 780, 797-798 (S. D. Texas 1971), *aff'd on other grounds* 476 F. 2d 989 (5th Cir. 1973) (finding divestiture to be inappropriate under the facts of the case); and **Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,** 1975-2 Trade Cases ¶ 60,568 (S. D. N. Y. 1975) (denying motion to dismiss a Section 7 claim).

15. **Calnetics** and **International Tel. & Tel.** are the only cases other than the instant one in which divestiture was actually ordered. See 11 Von Kalinowski, **Antitrust Laws and Trade Regulation** § 81.10[1] (1973).

16. The Ninth Circuit's opinion in the **International Tel. & Tel.** case reversed the divestiture orders in both **International Tel. & Tel.** and **Calnetics.** See 518 F. 2d at 921 n. 34.

Thus, there is no direct conflict in the circuits and, in any event, the question whether the remedy of divestiture is available to private antitrust plaintiffs is not properly presented in this case.

III.

Petitioners Have No Basis for Objecting to the Court of Appeals' Ruling on the "Engaged in Commerce" Question.

Under Point III of their Argument, petitioners seek to create the impression that the Court of Appeals ordered a new trial on the "engaged in commerce" question "solely because [**United States v. American Building Maintenance Industries,** 422 U. S. 271 (1975)] was decided after the trial of this matter" (Pet. 24). Nothing could be further from the truth. What happened was that respondent asked the Court of Appeals to hold that respondent was entitled to judgment as a matter of law, *inter alia,* on the ground that there was no evidence in the record which could support a finding that the "acquired" companies were corporations engaged in interstate commerce and that, therefore, petitioners had failed to satisfy the jurisdictional predicate for an action under Section 7 of the Clayton Act.[17] While the instant case was pending in the Court of Appeals, this Court handed down its decision in the **American Building Maintenance** case, stating, *inter alia,* that "the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce" (*id,* at 283) and that "to be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution,

17. Section 7 of the Clayton Act comes into play only when a "corporation engaged in commerce . . . acquire[s], directly or indirectly, the whole or any part of the stock or . . . assets of another corporation engaged also in commerce."

or acquisition of goods or services in interstate commerce." *Ibid.* Respondent argued that the record in this case did not satisfy an "engaged in commerce" test since the record clearly demonstrated that respondent's predecessor operators of the bowling centers in Poughkeepsie, Pueblo and Paramus were engaged solely in the operation of local bowling centers. The Court of Appeals was at least inclined to agree with this, saying (Pet. App. 15a-16a):

> ". . . had the district court granted a motion to dismiss at the close of the plaintiffs' case, on the ground that the new § 7 threshold had not been met, we might have been inclined to affirm that decision."

But the Court of Appeals did not order a dismissal of the case on this ground saying, instead (Pet. App. 16a):

> "There was, however, some evidence in the record to suggest that at least some of the acquired bowling centers may have made purchases of pins, pinsetter parts and perhaps other supplies, directly from Brunswick, rather than from local distributors. Thus, they arguably were engaged 'in the flow of interstate commerce' within the meaning of the new § 7 test. We think it would be unjust, given the intervening change in the law, to find that the evidence presented was insufficient to cross the jurisdictional threshold and thus order that the district court dismiss the case. We think it more appropriate, consistent with the way in which we will ultimately dispose of the case, to have the 'in commerce' question relitigated, with the plaintiffs' being given an opportunity to satisfy the new and more stringent jurisdictional test."

Thus, far from depriving petitioners of anything, the Court of Appeals (improperly, respondent believes) gave

petitioners a second chance—a chance to supply missing evidence. What more do petitioners want? The Court of Appeals' only alternative to ordering a new trial was to order the case dismissed.

Petitioners argue that the "engaged in commerce" question was decided in their favor by the jury acting under proper instructions (Pet. 24). Even if that were true, it would afford no basis for this Court to set aside the order directing a new trial. The basic reason that the Court of Appeals remanded the case for a new trial was not because of the "engaged in commerce" aspects of the case, but because the jury had been instructed improperly on both liability and damages.

Furthermore, the assertion that the "engaged in commerce" question was decided in petitioners' favor by a properly instructed jury is incorrect. While the trial judge gave lip service in his charge to the proposition that Section 7 requires a showing that the acquisition is from a corporation engaged in interstate commerce,[18] he never explained to the jury what had to be found before a conclusion of "engaged in [interstate] commerce" could be reached. The trial judge improperly said nothing about interstate commerce when he told the jury that "there are

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18.

> "As I previously instructed you, Section 7 of the Clayton Act provides that no corporation engaged in commerce shall acquire the whole or any part of the assets of another corporation also engaged in commerce where in any 'line of commerce' in any 'section of the country' the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly" (2268a).
>
> "Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove each and all of the following facts:
>
> "First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce. . . ." (2342a).

three elements involved in determining whether defendant violated Section 7 of the Clayton Act." [19] Moreover, he completely took away the "commerce" element from the jury when he turned to the actual application of the law to the facts. For example, the trial judge instructed the jury as to respondent's "acquisition" in Pueblo, Colorado (2317a):

> "The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area."

And he went on to instruct merely (2317a):

> "If Brunswick's acquisition of Belmont Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Belmont Lanes. . . ."

Similar instructions were given with respect to respondent's "acquisitions" in Poughkeepsie (2319a) and Paramus (2320a). By these instructions, the trial judge effectively told the jury that it need not concern itself with the threshold Section 7 requirement that each of the challenged "acquisitions" be from a corporation engaged in interstate commerce.

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19. "There are three elements involved in determining whether defendant violated Section 7 of the Clayton Act:

"One, determination of the relevant line or lines of commerce—the product market. The term 'product market' includes a service market as well as a product market in which the parties compete;

"Two, determination of the relevant section of the country, the geographic market;

"And three, determination of the likely anticompetitive effects of the acquisition of bowling centers in the relevant local market" (2268a).

That the trial judge removed this element from the jury's consideration was made starkly clear by the events that took place after the jury had retired for its deliberations. The jury sent a note to the trial judge expressly requesting, among other things: "Please clarify . . . Section 7 of the Clayton Act . . ." (2357a-2358a). The trial judge handed counsel the response he intended to give to the jury, which purported to be a paraphrase of Section 7. This again omitted any reference to the requirement that the corporation whose stock or assets had been "acquired" was "engaged in commerce" (2366a). Counsel for respondent objected, pointing out that this was an incorrect statement of Section 7, and urged the trial judge to include in his response to the jury the words "engaged in commerce" and the fact that this means "engaged in interstate commerce" (2370a-2371a). Counsel for petitioners countered by objecting to the inclusion of these words—even though they expressly appear in Section 7—on the ground that "to put it in here it seems to me is to invite the jury to labor over what is meant by being in commerce" (2376a) and "I think that the commerce aspect of it is just a red herring, and it shouldn't be pulled in here" (2377a). Over respondent's objection, the trial judge accepted the argument of petitioners' counsel and completely eliminated all reference to the critical "in commerce" element in "clarifying" Section 7 at this most crucial time (2381a). It is clear that it was not the jury, but the trial judge, who really decided the "engaged in commerce" issue in petitioners' favor.

Thus, although respondents present a "commerce" issue appropriate for review by this Court (see petition for certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.,** October Term 1975, No. —), petitioners herein do not.

IV.

The Court of Appeals Did Not Interfere With the Prerogatives of the Jury.

In Point IV of their Argument (Pet. 27-32), petitioners claim that the Court of Appeals interfered with the prerogatives of the jury. This simply is not so. It was the trial court, not the Court of Appeals, that interfered with the jury's prerogatives in this case. In the first place, as we have just noted, the trial judge effectively decided the threshold "engaged in commerce" question in petitioners' favor as a matter of law and did not leave any room for the jury to decide this jurisdictional question in respondent's favor.

Secondly, on the question of liability the trial judge repeatedly instructed the jury that the important thing to look at was market share:

> "[T]he primary index of legality is the market share of the acquired and acquiring companies and the extent of concentration in the industry" (2269a).
>
> "[H]igh market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7" (2270a).
>
> "I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly may conclude that Brunswick by the acquisition of [a specific bowling center in Pueblo, Colorado] violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market" (2317a-2318a).

> "[Y]ou may properly conclude that Brunswick by the acquisition of [a specific bowling center in Poughkeepsie, New York] violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained more than 20 per cent of the Poughkeepsie, New York bowling center market" (2319a-2320a).
>
> "[Y]ou may properly conclude that Brunswick by the acquisition of [specific bowling centers in the Paramus, New Jersey area] violated Section 7 of the Clayton Act because Brunswick through those acquisitions obtained allegedly 39 per cent of the Paramus, New Jersey, bowling center market" (2321a).

As the Court of Appeals noted: "This charge, in the context of the acquisition of retail outlets in relatively small geographic markets, was virtually a directed verdict" (Pet. App. 21a). "By emphasizing the quantitative substantiality of the market shares held by Brunswick, to the exclusion of other factors" (Pet. App. 22a), the trial judge did not permit the jury to perform its time-honored role as the finder of fact.

The trial judge's interference with the jury appears once again in the portion of the charge relating to the question of damages. There, as we have noted at pp. 18-19, *supra*, the trial judge instructed the jury that it "must" award damages within the range claimed in petitioners' testimony and exhibits. This instruction, which even petitioners concede was "a limited directed verdict" (Pet. 30), was a plain infringement of the jury's prerogatives. The jury did not have to find damages within the range submitted by petitioners. Each juror had the right to disbelieve petitioners' witnesses and reject their damage estimates whether or not "contradictory or impeaching

evidence was offered" (Pet. 32). Each juror had the right to find that petitioners had sustained no damages or that their damage claims were extravagant. The trial judge took these prerogatives away from the jury when he insisted that once it found liability the jury was required to award damages within the range claimed by petitioners.

It was the trial judge, not the Court of Appeals, who interfered with the jury's prerogatives and petitioners do not present any issue appropriate for review by this Court.

CONCLUSION.

For the foregoing reasons, the instant petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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